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112804—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 334

JOSEPH E. SEAGRAM & SONS, INC., PETITIONER
v.
THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 7–10) is reported in 36 F. Supp. 1013.

JURISDICTION

The judgment of the Court of Claims was entered February 3, 1941 (R. 10). A motion for a new trial was denied May 5, 1941 (R. 10). The petition for a writ of certiorari was filed August 2, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether petitioner is entitled to recover the amount of internal revenue tax paid by it on distilled spirits lost in the cistern room of its distillery through the negligence of one of its employees.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 8–12.

STATEMENT

This is an action for the recovery of $1,453.20, which was the amount of internal revenue tax paid by petitioner at the rate of $2 per proof gallon on 726.6 proof gallons of distilled spirits (gin) lost on August 24, 1936. The spirits were lost when they overflowed one of the tanks in the cistern room of petitioner's distillery as a result of the negligence of an employee of petitioner in failing to adjust the valves controlling the flow of the spirits in the pipes leading from the gin house to the cistern room so that the spirits would be directed, as ordered, into a tank which was empty, instead of, as happened, into one which was full or nearly full (R. 6, 7, 9). The spirits had been distilled in the still house, after which they had been transferred to the gin house, where ingredients were added to give the gin flavor and where, apparently, a further distillation took place (R. 5). In any event, the distillation of the

spirits had been completed prior to their conveyance to the cistern room through the pipes mentioned (R. 8). The cistern room was located some 450 feet from the gin house (R. 5). The tanks or receiving cisterns in it were used to hold spirits produced by petitioner until, under the supervision of a storekeeper-gauger employed by the Government and in charge of the key to the room as required by law, the spirits were withdrawn for deposit and entry in a warehouse (R. 4–5).

After reporting the loss, petitioner was assessed with the tax and payment was demanded (R. 6). Thereafter, on November 2, 1936, petitioner paid the tax under protest and filed a claim for refund, which was rejected on August 10, 1937 (R. 6). The petition in the court below was filed two years later (R. 1). The court below dismissed the petition, holding that the tax was properly assessed and collected (R. 9–10).

ARGUMENT

The decision of the court below is in accord with that of the Circuit Court of Appeals for the Seventh Circuit upon substantially identical facts in *Joseph E. Seagram & Sons* v. *Smith*, 113 F. (2d) 357. Cf. *Mason* v. *Peabody*, 16 Fed. Cas. 1060–1061. No conflict of decisions exists or is asserted and we submit that the decision of the court below is correct.

1. Paragraph (a) of Section 600 of the Revenue Act of 1918 (40 Stat. 1105), as amended by Section 900 (a) of the Revenue Act of 1926 (44 Stat. 104) and Section 2 of the Liquor Taxing Act of 1934 (48 Stat. 313), in force during 1936, provides that an internal revenue tax at the rate of $2 per proof gallon "shall be levied and collected on all distilled spirits now in bond or * * * hereinafter produced in * * * the United States * * * to be paid by the distiller * * * when withdrawn, and collected under the provisions of existing law." Section 3248 of the Revised Statutes specifies that "the tax shall attach to this substance [i. e., distilled spirits] as soon as it is in existence as such * * *." Section 3253 of the Revised Statutes provides:

> SEC. 3253. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

In dismissing the petition the court below relied upon the foregoing provisions as they appear, with some variations not here material, in Section 1150 (a) (1), (c), and (b), respectively, of Title 26 of the United States Code (1934 Ed.). It held that since the ~~distribution~~ distillation of the distilled spirits which were lost had been completed, they had come into "existence as such" and that accordingly the tax had attached (R. 8). It further held that payment of the tax was required under Section 3253, above quoted, there being no statute creating an exception in the case of spirits lost or destroyed in being removed to the cistern room (R. 9).

Petitioner concedes (Br. 11), as it must, that the tax had attached. See *Thompson* v. *United States,* 142 U. S. 471, 475; *United States* v. *Rizzo,* 297 U. S. 530, 533; *Greenbrier Distillery Co.,* v. *Johnson,* 88 Fed. 638 (C. C. A. 6). But it contends (Br. 9–10) that the tax was not assessable or due under Section 3253 because the spirits had not been "removed from the place where they were distilled." However, since the spirits were distilled in the still house, the process being completed either there or in the gin house (R. 5, 8), as is undisputed, it would appear that they were "removed from the place where they were distilled" when they were transferred from the still house to the gin house, or, if not then, when they were con-

veyed from the gin house to the cistern room.[1] If a removal outside the distillery inclusive of the cistern room were required before the tax could be assessed, as is urged by petitioner, it would have been unnecessary for Congress to have provided, as it later did, that in cases of certain deficiencies in production, the tax should not be assessed against spirits destroyed "in process of manufacture or distillation, or before removal to the distillery warehouse," when such destruction was caused by accidental fire or casualty without negligence on the part of the distiller. Act of March 1, 1879, c. 125, Sec. 6, 20 Stat. 340, as amended by the Act of May 28, 1880, c. 108, Sec. 8, 21 Stat. 147.

2. Petitioner also contends (Br. 10–19) that the court below erred in holding Section 3309 of the Revised Statutes, as amended, inapplicable. But that section, referred to by petitioner and the court as Section 1197 of Title 26 of the United States Code, relates to the assessment of the tax

[1] The record does not show what happened to the spirits here involved after they overflowed the tank in the cistern room, except that they were "lost." If, as is probable, they were carried off as waste or otherwise disposed of outside the plant, such might well have been a removal within the meaning of Section 3253 even as interpreted by petitioner. Moreover, whether or not they were removed within the meaning of Section 3253, it might be argued that when they were lost they were "withdrawn" within the meaning of Section 600 (a) of the Revenue Act of 1918, as amended, and hence properly taxed thereunder.

for deficiencies in failing to produce 80 percent of the producing capacity of the distillery, or in failing to produce, if materials in excess of capacity were used, the number of gallons that should have been produced therefrom. No such assessment or deficiency is involved in this case. The court found and the finding is undisputed that petitioner produced more than the required percentage, exclusive of the 726.6 gallons lost (R. 6). Moreover, even if the loss had resulted in a deficiency for which an assessment was made, petitioner's claim for recovery would not be advanced, since the loss did not occur "without any * * * negligence" of the distiller as required by the provisions cited at the end of the foregoing paragraph, referred to by the court as Section 1198 of Title 26 of the United States Code (R. 9).

CONCLUSION

The decision of the court below is correct. No important principle of law is involved and there is no conflict of authority. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1941.

APPENDIX

Revenue Act of 1918, c. 18, Sec. 600, 40 Stat. 1057, as amended by Sec. 900 (a), Revenue Act of 1926, 44 Stat. 104, and Sec. 2, Liquor Taxing Act of 1934, 48 Stat. 313:

> SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:
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> * * * * *
>
> (4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.
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> * * * * *

Revised Statutes:

> SEC. 3248. Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated

as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

SEC. 3253. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time, when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

SEC. 3309 [as amended by Sec. 5, Liquor Taxing Act of 1934, 48 Stat. 313]. On the receipt of the distiller's return in each month, the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than eighty per centum of the producing-capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of tax imposed by law for every proof-gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses

in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of tax imposed by law for every proof-gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds eighty per centum of the producing-capacity of the distillery. If the Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of tax imposed by law for every proof-gallon: *Provided*, That the actual product shall be assumed to be in no case less than eighty per centum of the producing-capacity of the distillery as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid.

Act of March 1, 1879, Sec. 6, 20 Stat. 340, as amended by the Act of May 28, 1880, Sec. 8, 21 Stat. 147:

SEC. 6. That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment

shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose, on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises. And the Commissioner of Internal Revenue upon the production to him of satisfactory proof of the actual destruction, by accidental fire or other casualty, and without any fraud, collusion, or negligence of the distiller of any spirits in process of manufacture or distillation, or before removal to the distillery warehouse, shall not assess the distiller for a deficiency